APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 05-1454
[Filed December 14, 2006]

MICHAEL A. THOMAS)
Plaintiff-Appellant,)
)
v.)
)
JOHN E. POTTER,)
Defendant-Appellee.)

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 02 C 3576
James B. Zagel, *Judge*

Before Hon. RICHARD A. POSNER, *Circuit Judge*,
Hon. DIANE P. WOOD, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

ORDER

Plaintiff-Appellant filed a petition for rehearing and rehearing en banc on November 27, 2006. No judge in regular active service has requested a vote on the petition for rehearing en banc and all members of the original panel have voted to DENY rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 05-1454
[Filed October 11, 2006]

MICHAEL A. THOMAS)
Plaintiff-Appellant,)
)
v.)
)
JOHN E. POTTER,)
Defendant-Appellee.)
)

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 02 C 3576
James B. Zagel, *Judge*

Before Hon. RICHARD A. POSNER, *Circuit Judge*,
Hon. DIANE P. WOOD, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

ORDER

Michael Thomas brought suit under Title VII, alleging that the United States Postal Service retaliated and discriminated against him based on his gender when it changed his shift schedule. The district court granted summary judgment for the Postal Service, concluding that a mere change in shift schedule which does not materially affect the terms of employment cannot constitute an adverse employment action. We affirmed in *Thomas v. Potter,* No. 05-1454, 2005 WL 1994328 (7th Cir. Aug. 18, 2005). The Supreme Court subsequently held in *Burlington Northern & Santa Re Railway Co. v. White,* 548 U.S. ___, 126 S.Ct. 2405 (2006), that the anti-retaliation provision of Title VII is not limited to actions that materially affect the terms and conditions of employment, but rather "an employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace." *Id.* at 2412-13 (italics in original). In so holding, the Court noted with approval that other circuits, including this one, have declined to limit the scope of the anti-retaliation provision. *See id.* at 2410-11 (citing *Washington v. Illinois Department of Revenue,* 420 F.3d 658, 662 (7th Cir. 2005)). Shortly thereafter, the Supreme Court granted Thomas' petition for a writ of certiorari and remanded the case to this court for further consideration in light of the decision in *Burlington Northern.* We invited the parties to comment on the effect *of Burlington Northern.* On consideration *of Burlington Northern* and the parties' comments, we again affirm the district court's judgment.

The proper inquiry under *Burlington Northern* and our *pre-Burlington Northern* case law is whether a reasonable employee would have found the challenged retaliatory act materially adverse in that it would dissuade a reasonable

worker from filing a charge, regardless of whether the act is employment-related. *Burlington Northern,* 126 S.Ct. at 2414-16; *Washington,* 420 F.3d at 661-63. Here, the purported retaliatory act--the change to Thomas's shift schedule--is directly related to his employment. Therefore *Burlington Northern* does not alter the outcome of this case, unless there was intentional, non-employment-related harm to Thomas from the shift change. *Burlington Northern,* 126 S.Ct. at 2415-16 (citing *Washington,* 420 F.3d at 662). In *Washington,* we concluded that a jury could find that Washington's employer retaliated against her because it exploited her "unique vulnerability" by changing her work schedule knowing that she would be required to take two hours of leave per day to care for her disabled son. *Washington,* 420 F.3d at 662-63.

However, unlike in *Washington,* Thomas does not assert--nor does the record contain any evidence--that he had a unique vulnerability that the Postal Service knew about and sought to exploit by changing his shift schedule. Thomas's assertion that the shift change was undesirable or inconvenient to him does not rise to the level of harm sufficiently serious to "dissuade[ ] a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern,* 126 S.Ct. at 2415 (quoting *Washington,* 420 F.3d at 662). In any event, Thomas identifies no evidence that the Postal Service imposed the shift change with the knowledge or intention that Thomas would consider it undesirable or inconvenient. Accordingly, we cannot say that the district court erred in concluding that Thomas failed to demonstrate that the challenged retaliatory act had a materially adverse effect on him.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 05-1454
[Filed October 24, 2005]

MICHAEL A. THOMAS)
Plaintiff-Appellant,)
)
v.)
)
JOHN E. POTTER,)
Defendant-Appellee.)
)

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 02 C 3576
James B. Zagel, *Judge*

Before Hon. RICHARD A. POSNER, *Circuit Judge,*
Hon. DIANE P. WOOD, *Circuit Judge*
Hon. TERRENCE T. EVANS, *Circuit Judge*

ORDER

Plaintiff-appellant filed a petition for rehearing en banc on September 30, 2005. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all members of the original panel have voted to DENY rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 05-1454
[Submitted August 18, 2005*]
[Filed August 18, 2005]

MICHAEL A. THOMAS)
Plaintiff-Appellant,)
)
v.)
)
JOHN E. POTTER,)
Defendant-Appellee.)

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 02 C 3576
James B. Zagel, *Judge*

* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. See Fed. R. App. P. 34(a)(2).

Before Hon. RICHARD A. POSNER, *Circuit Judge,*
Hon. DIANE P. WOOD, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

ORDER

Michael Thomas brought this suit under Title VII, alleging that the United States Postal Service retaliated and discriminated against him based on his gender when it changed his shift schedule. The district court granted summary judgment for the Postal Service, concluding that a mere change in shift schedules which does not materially affect the terms of employment cannot constitute an adverse employment action.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 C 3576
[Filed December 20, 2004]

MICHAEL A. THOMAS)
)
v.)
)
JOHN E. POTTER)
)

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that summary judgment is entered in favor of defendant and against plaintiff, Michael Thomas. Plaintiff take nothing from the defendant.

Docketed DEC 20 2004

Michael W. Dobbins, Clerk of Court

Date: 12/19/2004 /s/
Donald Walker, Deputy Clerk

On May 20, 2002, Plaintiff filed the instant suit, alleging gender discrimination and retaliation in violation of Title VII. Defendant now moves for summary judgment on the grounds that Plaintiff cannot establish *a prima facie* case for discrimination or retaliation. In the absence of direct evidence of discrimination and/or retaliation, as is the case here, the plaintiff must establish a *prima facie* case for each. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). To establish *a prima facie* case for discrimination and/or retaliation, the plaintiff must show that he suffered an adverse employment action. *See Id; Hilt-Dyson v. Chicago,* 282 F.3d 456, 465 (7th Cir. 2002). Not everything that makes an employee unhappy is an actionable adverse action. *Smart v. Ball State Univ.,* 89 F.3d 437, 441 (7th Cir, 1996). Only tangible employment actions that cause a significant change in employment status constitute actionable adverse actions. *Burlington Indus. v. Ellerth,* 524 U.S. 742, 753 (1998). Examples of actionable adverse actions include hiring, firing, failing to promote, reassigning with significantly different responsibilities, and a decision causing a significant change in benefits, *Id.* The action must cause a materially adverse change in the terms and conditions of employment that is "more disruptive than a mere inconvenience or an alteration of job responsibilities." *Crady v. Liberty Nat'l Bank & Trust Co.,* 993 F.2d 132, 136 (7th Cir. 1993).

Plaintiff alleges that Defendant's decision to move him from the day to the evening shift constituted an adverse employment action. I must disagree. In *Grube v. Lau Indus.,*

257 F.3d 723,728 (7th Cir. 2001), the Seventh Circuit held that a decision to change an employee's work shift, without a change in the employee's title, pay or responsibilities, does not rise to the level of an adverse employment action. Since Plaintiff has not alleged an actionable adverse employment action, I find that summary judgment on his claim is appropriate.[1]

Defendant's Motion for Summary Judgment is GRANTED.

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[1] Because summary judgment is appropriate on these grounds, I need not address Defendant's other arguments.

APPENDIX F

[EXHIBIT # 1]

EQUAL EMPLOYMENT OPPORTUNITY SETTLEMENT AGREEMENT

CHICAGO DISTRICT OFFICE
[Filed December 5, 1994]

Michael A. Thomas	)
Complainant	)
	)
vs.	)
	)
United States Postal Service	)
Respondent	)
	)

In full and complete resolution of the Complaint herein; the undersigned parties agree as follows;

1. All parties agree that it is in the best interests of effective functioning of the administrative Equal Employment Opportunity procedures to keep confidential the terms and conditions of this Settlement. The complainant, as a term and condition of Settlement, agrees to keep confidential the information within and not to disclose said information to any third party other than legal counsel.

2. By entry into this Settlement Agreement, the United States Postal Service, its officers, agents, and/or employees in no way admit to any wrongdoing, liability to or discrimination against the Complainant. The Complainant agrees that this Agreement shall not be construed as an admission of wrongdoing, liability or discrimination by the United States Postal Service, its officers, agents and/or employees in this or any other proceeding or litigation.

3. It is understood by the undersigned that this Agreement is in full and complete settlement of all outstanding administrative EEO complaints or appeals, in this or any other forum, filed by the below named Complainant or on his behalf relating to any matters that occurred prior to the execution of this Settlement Agreement. The below named Complainant agrees to voluntarily withdraw any outstanding administrative complaint or appeal, and to request that any grievance be withdrawn. These include, but are not limited to, case I-J-1159-93 . It is understood that settlement is contingent upon those complaints, appeals, or grievances being withdrawn. It is further stipulated that the withdrawals are made without any threat, coercion, intimidation, promise, or inducement other than the terms set forth in the Agreement.

4. The Complainant (Michael A. Thomas) shall be placed in the position of Tools and Parts Clerk, PS Level 5, Step O. The Complainant will be placed in the position of Tools and Parts Clerk; S PI 36, PS Level 5, Step O, no later than thirty (30) days from the date the Agreement is signed by all parties involved. Seniority for Preferred Assignments will be October 3, 1992.

5. It is agreed that should the Postal Service fail to adhere to the stipulations contained in this agreement for any reason not attributable to acts or conduct of the Complainant, the

Complainant may request that the terms of the settlement agreement be specifically implemented or alternatively, that the complaint be reinstated for further processing from the point processing ceased under the terms of the settlement agreement.

6. Further, this Settlement Agreement resolves all of the issues related to the Complainants Complaint, No. _-J-1159-93_, against the United States Postal Service.

I MICHAEL A. THOMAS, Michael A. Thomas have read, and understand the conditions and restrictions set forth in the above agreement. I am mentally and physically fit so as to be able to understand this agreement in its entirety. I freely sign this agreement without reservation, duress, or coercion on the part of anyone.

/s/Michael Thomas 12-5-94	/s/Tyrone Brinson 12/5/94
Complainant Date	Complainant's Representative

/s/Ronald Pope 12-5-94
Agency Representative Date

APPENDIX G

[EXHIBIT #2]

NOTIFICATION of PERSONNEL ACTION
U.S. Postal Service

01) Effective Date 5-25-1996

02) Social Security Number xxx-xx-5474

84) **Remarks**
IN ACCORDANCE WITH GRIEVANCE SETTLEMENT J-J-1159-93
SENIORITY WILL BE 10-03-92 AS UNASSIGNED REGULAR
JOB 7986969 IS INCUMBENCY ONLY
DOCUMENTATION RECEIVED AND IN MAINTENANCE FIILES
PC 6-3-96

85) **Authorization**
JOHN T. WEEKER, VICE PRESIDENT
AREA OPERATIONS-GREAT LAKES

86) Processed Date 06-03-1996
87) Personnel Office ID TB22
88) OPF Location CHICAGO PROC/DIST CTR

PS Form 50, March 1990 (Exception to Standard Form 50)
2 - OPF COPY

APPENDIX H

[EXHIBIT #3]

MEMORANDUM OF UNDERSTANDING APWU-MAINTENANCE STAFFING

The following agreement is entered into between the American Postal Workers Union, Chicago Local, and the United States Postal Service to facilitate the placement of maintenance craft employees in the Chicago Center Processing and Distribution Center.

1) Employees holding positions in the Old Chicago P & D Center which are perfect matches to positions established at the Chicago Central P & D Center, will be reassigned to the Chicago Central position. Seniority tie breakers will be as established in the National Agreement.

2) Positions not directly matched to established positions at the Old Chicago P & D Center will be posted for bid as follows:

a. To all affected qualified employees only, within the occupation group of the posted position.

b. Residual positions shall be filled by means of promotion of the affected employees, through the appropriate promotion eligibility register.

c. If after completion of the above process residual vacancies exist, consideration will be given to affected

higher level qualified employees who have previously submitted a written request for assignment to a lower level.

d. **Remaining affected employees will be assigned to detail duties as unassigned employees. Employees will be allowed to exercise their preferences for work schedules by craft seniority. An equal number of preference eligibles, to the number of non veterans obtaining positions via items 1 and 2 above, shall remain in their corresponding section in the new Chicago Central Facility unless that section is eliminated.**

Employees assigned to duties under this provision will retain their current job title classification, level and grade. Positions assigned under this section will be the incumbent only position. This will apply for each employee assigned under this section until the employee retires, separates voluntarily or involuntarily, or voluntarily bids to a lower level position. The position will be reverted upon being vacated by above assigned employee. Vacation selection and overtime assignments for employees assigned duties under this provision will be made in accordance with the section to which the employees are assigned in the Chicago Central Facility.

The parties agree that the effective date of bids under this agreement shall be the date of reassignment to the New Chicago Central Facility.

/s/ 1-5-96
Herby Weathers, Jr. Date
General President
American Postal Workers Union
Chicago Local

/s/ 1-5-96
David C. Fields, Sr. Date
Sr. Plant Manager
Chicago P & DC

APPENDIX I

[EXHIBIT #4]

MAINTENANCE MANAGER
CHICAGO PROCESSING & DISTRIBUTION CENTER

UNITED STATES POSTAL SERVICE

Thomas, M.
5474
Maintenance Support Clerk PS-5

Official personnel records indicates you failed to receive a position during the bidding process. Accordingly you are now considered an unassigned regular employee.

This notice serves as official notification of such and advises of your new assignment within the Central Facility.

Assignment:	Maintenance Support Clerk PS-5
Work Schedule:	Tour 3
Non-Schedule Days:	THU/FRI

The effective date of your new assignment is October 12, 1996.

/s/Charles S. May
for John U. Garcia

FJR/fjr

cc: Herby Weathers, Jr.
Personnel

APPENDIX J

[EXHIBIT #5]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 02 C 3576

MICHAEL A. THOMAS
Plaintiff

v.

JOHN E. POTTER,
POSTMASTER GENERAL - -
UNITED STATES POSTAL SERVICE,
Defendant

DEFENDANT'S RESPONSE TO
PLAINTIFF'S INITIAL REQUESTS FOR ADMISSION

COMES NOW the Defendant, John E. Potter, Postmaster General, United States Postal Service, and respectfully submits its Response to Plaintiff's Initial Requests for Admission.

1. Plaintiff PS Form 50 (exhibit #14) states that "in accordance with grievance settlement 1-J-1159-93 seniority

will be 10-03-92 as unassigned regular. However, are there any stipulation of becoming unassigned regular agree upon pursuant to the Plaintiff EEO Settlement Agreement of December 5, 1994 (exhibit #13)?

ANSWER: The settlement agreement does not state that plaintiff will be designated an unassigned regular. Plaintiff was designated as "unassigned" because there were no positions available when he was placed into the job pursuant to the EEO settlement agreement.

2. Pursuant to section 2D of the MOU (exhibit #1) were there any unassigned maintenance employees that was allowed to excise their preference by craft seniority?

ANSWER: No maintenance employees were allowed to exercise options under 2D of the MOU dated 1/5/96.

3. Were the five aforementioned female listed in this complaint, classified as an unassigned employee during the period of January 1996 through June 1999?

ANSWER: The five female employees identified by Plaintiff in his Complaint were listed as unassigned employees during the subject time period.

4. In regard to the five aforementioned female employees, did their tour change?

ANSWER: Their tours did not change during the time period identified in number 3 above.

5. Was there a bidding process conducted for the unassigned Maintenance Support Clerk during the period of January 1996 through February 1997?

ANSWER: There was no bidding process during the subject time period.

6. Prior to the Plaintiff receiving his official Notice of Assignment (exhibit #3) was the Plaintiff afforded an opportunity to exercise his preference?

ANSWER: Neither plaintiff or any other maintenance support clerk was allowed to exercise their preferences.

I declare under penalty of perjury, that the foregoing information contained in Defendant's responses to Plaintiff's Initial Requests For Admission is true and accurate to the best of my knowledge.

/s/
Charles E. May
Maintenance Manager
Chicago Processing &
Distribution Center
United States Postal Service

APPENDIX K

[EXHIBIT #6]

MICHAEL A. THOMAS
17421 LOOMIS STREET
EAST HAZEL CREST, IL 60429
(708) 798-4147

JOHN U. GARCIA
MANAGER, MAINTENANCE
433 W. HARRISON
CHICAGO, IL 60607

JULY 8,1997

As per ours conversation dated July 7,1997 that indicated a possible settlement agreement.

SETTLEMENT AGREEMENT

In accordance with the Memorandum of Understanding an agreement made between the American Postal Worker Union (APWU) and the U. S. Postal Service dated Jan 5, 1996. Unassigned employees will be allowed to exercise their preference for work schedules by craft seniority.

Appellant will be allowed to exercise his preference for work schedule by maintenance craft seniority.

The Agency agree to temporarily change Appellant's tour, from tour 3, Thursday and Friday RDO to tour 1, Monday and Tuesday RDO. This temporarily change will remain in effect until after the final out come of the appellant selection

for preference for work schedule by maintenance craft seniority.

After selection for work schedule has been granted, appellant will remain in that assignment as an unassigned regular, incumbency only.

Enclosure: Memorandum of Understanding, APWU-Maintenance Staffing dated Jan 5, 1996.

Respectfully submitted

/s/_____
Michael A. Thomas

MAINTENANCE
JUL 8 324 PM '97